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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees* respectfully move to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in these cases. Supreme Court Rules 16.1(c) and (d).

*This motion is brought on behalf of all Appellees named in the listing of "Parties", *supra*.

Additionally, appellee J-R Distributors, Inc., alone, respectfully moves to dismiss the appeals [in Docket No. 84-143] of appellants JEFFREY C. SULLIVAN, Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, City Attorney for the City of Yakima, State of Washington, on the ground that they failed to file a timely Notice of Appeal. Supreme Court Rule 16.1(a). This Motion to Dismiss as to appellants SULLIVAN and ANDREWS is based upon the fact that their Notice of Appeal was not filed in the Ninth Circuit Court of Appeals until July 9, 1984, 94 days after the date on which the Ninth Circuit denied their petition for rehearing en banc. *See,* Supreme Court Rules 11.2, 11.3, 11.4 and 28 U.S.C. § 2101(c).

THE ISSUES PRESENTED ARE INSUBSTANTIAL

A. Prurient Interest

In *Miller v. California,* 413 U.S. 15, (1973), a majority of this Court, after wrestling with "the intractable problem of obscenity" for sixteen years, finally agreed on a constitutionally based definition of obscenity intended to bring uniformity and stability to what had been a confusingly amorphous area of the law. The singular achievement of this opinion was that it brought uniformity and a semblance of notice to those involved in presumptively protected sexually oriented speech by demarcating a legislative-like line beyond which government could not go in

its efforts to proscribe sexually oriented speech.[1] At the same time, it put distributors on notice that materials beyond the boundaries of *Miller* could subject them to prosecutions in those states choosing to define "obscenity" as broadly as permitted by the Constitution.

In the aftermath of *Miller*, anti-obscenity legislation throughout the country was brought into conformity with *Miller* either by legislative action or judicial construction. The State of Washington was no exception. In *State v. J-R Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (Wash. 1973), *cert. den.* 418 U.S. 949, the Washington Supreme Court read the *Miller* test into Washington's previous obscenity statute. Under this judicial construction, Washington had (from 1973 until the legislation here at issue was passed in 1982) an enforceable criminal obscenity statute defining obscenity under *Miller's* three-part test, specifically requiring that material, taken as a whole, must appeal to a "prurient interest" in sex as judged by the average person applying contemporary standards.

After nine years of acquiescing in this unquestionably valid criminal obscenity statute, the Washington Legislature passed the statute at issue herein in which, *inter alia*, it rejected the prior statute's undefined use of "prurient interest" and then defined that phrase to include anything which incites, *inter alia*, mere "lust." R.C.W. § 7.48A.010(8).

At p. 6 of its Jurisdictional Statement, the Attorney General [appellant Eikenberry] argues that the Washing-

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[1] Appellees, along with many others, nonetheless continue to support the positions expressed by Justice Brennan [dissenting in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973)] and Justice Stevens [dissenting in *Smith v. United States*, 431 U.S. 291, 311 (1977)].

ton Legislature was victimized by a "legal ambush" in that it was assertedly punished for its good faith attempts to follow this Court's pronouncements. Nothing could be further from the truth. For a nine year period the State had and utilized a statutory definition of obscenity which was perfectly acceptable under controlling Supreme Court authority. The State simply could have relied upon the statutorily undefined use of the term "prurient interest" and the accepted definition of that legal term of art.[2] Alternatively, the State could have expressly adopted the Model Penal Code's definition of "prurient interest" as a "shameful or morbid" interest in sex. Either approach would have guaranteed that the law would not have exceeded permissible constitutional boundaries. Instead, the State enacted a statute which permitted a finding of obscenity which, with respect to prurience, was predicated exclusively on the material's appeal to no more than a normal and healthy "lustful" interest in sex.

In *Roth v. United States*, 354 U.S. 476, 487 (1957), this Court held that "sex and obscenity are not synonomous." The thrust of that statement in *Roth* was that sexually oriented speech appealing to a normal and healthy interest in sex (as viewed by the average person) could not constitutionally be prohibited whereas sexually oriented speech which appealed to an unhealthy or shameful or morbid interest (as viewed by the average person) *could* be prohibited by appropriately drafted legislation.

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[2] *See, Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981), *cert. den. sub nom Theatres West Inc. v. Holmes*, 455 U.S. 913 (1982).

In holding the statutory definition unconstitutional in this case, the Ninth Circuit[3] acted consistently with every federal court and the vast majority of state courts which have considered this issue. *See,* e.g., *United States v 35mm. Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705, 711-712 (2nd Cir. 1970) [where the Second Circuit concluded that this Court, in using the term "prurient interest," "never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality"]; *Penthouse International, Ltd. v. McAuliffe,* 610 F.2d 1353, 1363-1364 (5th Cir. 1980) [interpreting *Roth* and *Miller* as adopting the A.L.I. Model Penal Code definition of "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."]; *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1026 (5th Cir. 1981) [sustaining against constitutional challenge a Texas statute using the term "prurient interest" without further definition but, nonetheless agreeing that that term in fact "means shameful and morbid"]; *Goldstein v. Allain,* 568 F.Supp. 1377, 1385-1386 (N.D. Miss. 1983) [preliminary injunction issued enjoining enforcement of new Mississippi obscenity statute defining "prurient interest," *inter alia,* as simply a "lustful" or "erotic" interest]; *Community Television of Utah v. Roy City,* 555 F.Supp. 1164, 1169, n. 23 (D.Utah 1982) [distinguishing between the term "prurient interest" used in *Miller* and the term "arousing sexual interest" used in the ordinance stricken in that case]; *Little Store, Inc. v. State of Maryland,* 453 A.2d 1215 (Md.

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[3] Rehearing *en banc* was denied unanimously by the Ninth Circuit. See the Appendix to appellant Eikenberry's Jurisdictional Statement at D-3.

1983) [reversing an obscenity conviction where the trial court's jury instructions defined "prurient" as a "tendency to excite [a] normal lustful interest in sex", *id.* at 1217]; *Leech v. American Booksellers Ass'n., Inc.,* 582 S.W.2d 738, 749-750 (Tenn. 1979) [concluding that *Roth* and *Miller, supra,* used the term "prurient interest" with reference to an interest in sex which was considered either "shameful or morbid"]; *State of Kansas v. The Great American Theatre Co.,* 227 Kan. 633, 608 P.2d 951 (1980) [where the Kansas Supreme Court, in rejecting the State's proposed jury instruction which would have defined prurient interest exclusively as "an appeal to sexual desire" concluded that this Court "meant something more than merely an appeal to sexual desires when it discussed the element of prurient appeal," *id.* at 640]; and *Andrews v. State of Texas,* 652 S.W.2d 370, 389 (Tex.Cr.App. 1983) [concluding that a properly instructed jury in Texas—where the statutory term "prurient interest" is otherwise undefined—would have to make a finding that the material appeals to "such a shameful or morbid interest in sex as to be prurient," *id.* at 389].

Similarly, the Ninth Circuit's ruling was also consistent with the historical conception of obscenity as "the present critical point in the compromise between candor and *shame* at which the community may have arrived here and now." [Emphasis added], *United States v. Kennerley,* 209 F. 119, 121 (S.D.N.Y. 1913) (L. Hand, J.). *See also,* e.g., the concurring opinion of Justice Harlan in *Smith v. California,* 361 U.S. 147, 171, n. 2 (1959) and *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d 132, 137 (2nd Cir. 1983).

Similarly, the Ninth Circuit's ruling was consistent with every ALI Model Penal Code definition of obscenity which has been in existence since *Roth*. The ALI standard is particularly significant because, at the conclusion of fn. 20 in *Roth*, 354 U.S. at 487, this Court referred to the comments at pp. 10 and 29 of Tentative Draft No. 6 to the 1957 version of the portion of the Model Penal Code defining obscenity. At p. 10 of that draft, the American Law Institute stated:

> "Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters . . . . *We reject the prevailing test of tendency to arouse lustful thoughts or desires* because it is unrealisticly broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art . . . . * * * On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters." (Emphasis added.) ALI Model Penal Code, § 207.10 (Tent.Draft No. 6, 1957), comment at 10.

The referred-to language at p. 29 of the comments was even more specific:

> "In specifying that the appeal must be to *prurient* interest, the proposed definition recognizes that there is a normal interest in sexual matters, for which it should be lawful to provide satisfaction through works of art as well as scientific and educational writings. The prurient interest is an *exacerbated, morbid, or perverted interest* . . . ." [Emphasis in original.] ALI Model Penal Code, § 207.10 (Tent.Draft No. 6, 1957), comment at 29.

The Ninth Circuit's ruling is similarly consistent with fn. 2 of this Court's opinion in *Miller v. California, supra,*

where, at the end of the footnote, this Court refers to the definition of obscenity contained in the 1962 Official Draft of the ALI Model Penal Code. That definition provided:

> "§ 251.4 Obscenity
>
> (1) *Obscene Defined.* Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, *a shameful or morbid interest*, in nudity, sex or excretion . . . ." (Emphasis added), ALI Model Penal Code § 251.41(1) (Official Draft, 1962).

Nowhere in *Miller* is *Roth's* fn. 20 mentioned, nor is any definition of "prurient interest" other than that of the ALI.

The Ninth Circuit's determination that a "prurient" interest is not the same as simple "lust" is also supported by the statutes of a vast majority of the 50 states. While many state statutes define a "prurient interest" specifically as a "shameful or morbid" interest,[4] the majority of states simply employ the term "prurient interest" and leave it otherwise undefined.[5]

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[4] See, e.g., Cal. Penal Code § 311(a); Fla. Stats. Ann. § 847.07(2)(a); Code of Ga. Ann. § 26-2101(b)(1) [but see *Spry* v. *State*, 156 Ga.App. 74, 274 S.E.2d 2, 5 (1980) purporting to permit a jury instruction simply using the term "lust"]; Idaho Code § 18-4101(B); Ill. Ann. Stats. Chapt. 38, § 11-20(b); Code of Laws of S.C. § 16-15-260(b); S.D. Codified Laws § 22-24-27(12); Tenn. Code Ann. § 39-6-1101(8) and Code of Va. § 18.2-372.

[5] Unless otherwise noted, all of the following states have obscenity statutes which utilize the phrase "prurient interest" but do not otherwise further define it: Code of Ala. § 13A-12-150(1)(a); Ariz. Rev. Stats. § 13-3501-2(a); Ark. Stats. § 41-3585.1(4)(b); Colo. Rev. Stats. § 18-7-101(2)(a); Conn. Gen. Stats. Ann. § 53a-193(a); Del. Code Ann. Title 11 § 1364(1);

(Continued on next page)

Of the 50 states, only 5 supply specific definitions of the term "prurient interest" not expressly requiring a finding of a "shameful or morbid" interest.[6] Of these 5 states, only two permit a finding of "prurient interest"

(Continued from previous page)

Hawaii Rev. Stats. § 712-1210(6) (a); Ind. Stats. Ann. § 35-49-2-1(1); Iowa Code Ann. Vol. 55 § 728.4; Kan. Stats. Ann. § 21-4301(2) (a); Ken. Rev. Stats. § 531.010(3) (a); La. Stats. Ann. § 14:106A(3); Maine Rev. Stats. Ann. Title 17 § 2912-2B(1); Ann. Code of Md. Art. 27, § 418 [note: this statute simply uses the word "obscene" but was construed (in *Little Store, Inc. v. State*, 453 A.2d 1215 (Md. 1983)) to require proof of a shameful or morbid interest rather than a mere "lustful interest"]; Mass. Gen. Laws Ann. Chapter 272 § 31; Minn. Stats. Ann. § 617.241(1) (a); Ann. Mo. Stats. § 573.010(1) (a); Mont. Code Ann. § 45-8-201(2) (b) (i); Rev. Stats. of Neb. § 28-807(9) (a) [note: this statute uses the phrase "appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion"]; Nev. Rev. Stats. § 201.235-4(a); N.J. Stats. Ann. § 2C: 34-2-a(1) (c); N.M. Stats. § 30-38-1-B(1); N.Y. Penal Law § 235. 00-1(a); Gen. Stats. of N.C. § 14-190.1(b) (2); N.D. Century Code § 12.1-27.1-01-4-a; Okla. Stats. Ann. Title 21 § 1024.1-1 and -2 (c); Ore. Rev. Stats. § 167.087(2) (b); Pa. Consol. Stats. Ann. Title 18 § 5903(b); Gen. Laws of R.I. § 11-31-1; Tex. Codes Ann. Title 9 § 43.21(a) (1) (A); Utah Code Ann. § 76-10-1203 (1) (a); Vt. Stats. Ann. § 2801(6) (A) [note: this statute only prohibits dissemination of matter "harmful to minors" and, in that context, refers to material which "appeals to the prurient, shameful or morbid interest of minors"]; W.Va. Code § 61-8A-1(7) (a); Wis. Stats. Ann. § 944.21(1) (a); [note: this statute simply uses the word "obscene" with no further definition; however, it was held unconstitutional and unenforceable by the Wisconsin Supreme Court in *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (Wis. 1980)]; Wy. Stats. § 6-4-301(a)-(iii) (A).

[6] *See*, e.g., Michigan Statutes Annotated § 28.575(1) and (2); Mississippi Code Annotated § 97-29-103(1) (a); New Hampshire Revised Statutes Annotated Chapter 650:1-IV(a); Ohio Revised Code Annotated § 2907.01(F) (1-5); and Revised Code of Washington Annotated § 7.48A.010(8).

based upon a simple showing of "lust", [7] i.e. Washington and Mississippi. [As mentioned previously, the statutes of both of these two states have been stricken by federal courts due to their overly broad definitions of "pruri-

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[7] In *State* v. *Burgun*, 56 Ohio St.2d 354, 384 N.E.2d 255, 261 (Ohio 1978), the Ohio Supreme Court specifically held that, before material could be found obscene, it must not only meet the rather complex *statutory* definition of obscenity, but, *in addition*, it must meet the three-part test of *Miller*. Pursuant to the authoritative construction rendered in that case, an Ohio jury must now make a finding that the material appealed to a "prurient interest," and there is no further specific definition which would limit that interest to a simple "lustful" interest. Indeed, even the prior statute required something in addition to simple lust before the requisite finding could be made.

In *People* v. *Neumayer*, 405 Mich. 341, 275 N.W.2d 230 (Mich. 1979), the Michigan Supreme Court simply *replaced* their prior obscenity statute with the familiar three-part *Miller* test. However, even under the prior statute, it was not clear that a simple showing of "lust" would suffice.

The New Hampshire statute, *supra*, simply defines a "prurient interest" as "an interest in lewdness or lascivious thoughts." This definition at least implies some aspect of unwholesomeness beyond mere erotic or lustful appeal.

Both the Attorney General's Jurisdictional Statement (at p. 11) and Judge Wallace's dissent in the Ninth Circuit's opinion herein [see p. A-37 of Appendix "A" attached to the Jurisdictional Statement filed by the Attorney General in this case] state that Nebraska's statute defines "prurient interest" as the excitation of "lustful thoughts." However, subsequent to the 1964 statute quoted by Judge Wallace and the Attorney General, the Nebraska Legislature specifically *changed* the definition of "prurient interest" to eliminate any reference to "lustful thoughts" or "lust." Under the new statute, Neb. Rev. Stat. § 28-807(9), the statute refers to material which "appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion. . . ."

ent interest", both of which defined the phrase in terms of mere "lust."[8]]

The insubstantiality of the issue raised by the State of Washington is additionally evidenced by the fact that appellants *conceded* at the District Court level that "the term 'prurient interest' has become a 'term of art' or a shorthand for a 'shameful or morbid interest in sex, nudity or excretion.' "[9]

Additionally, at least at one point in this case, appellants argued that it was the Legislature's *intent* that the term "prurient interest" was the equivalent of a "shameful or morbid" interest.[10]

For these reasons, it is respectfully submitted that the issue presented in the Jurisdictional Statement is so insubstantial as not to require plenary review by this Court.

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[8] The present case, of course, involves the striking of the Washington statute. In *Goldstein v. Allain, supra,* 568 F.Supp. 1377, 1385-1386 (N.D.Miss. 1983), the court issued a preliminary injunction against enforcement of the Mississippi statute. That case is presently on appeal.

[9] This statement appears at p. 6, lns. 4-6 of a document entitled "CONSOLIDATED MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFF'S COMPLAINTS FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF" filed by Appellant Sloane, counsel for the City of Spokane. This document was filed in the District Court on May 18, 1982 and p. 11 of this document appears in the Ninth Circuit's Consolidated Excerpt of Record at p. 100. The Sloane memorandum was expressly adopted by appellant Brockett (see p. 133 of the Consolidated Excerpt of Record filed in the Ninth Circuit) and appears to have been adopted by the Attorney General as well. See p. 119 of the Consolidated Excerpt of Record, lns. 9-13.

[10] At p. 100 of the Consolidated Excerpt of Record, lns. 15-18, appellant Sloane stated:

> "Reading the entire statute, it becomes patently clear that the legislature intended to prohibit the sale and/or display of materials, intended to appeal to the 'shameful or morbid interest' in sex, nudity or excretion."

B. Overbreadth Standing

The jurisdictional statements do not raise any substantial federal question concerning appellees' standing to bring a facial attack challenging the overbreadth inherent in Washington's statutory definition of "obscenity."

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court held that a facial overbreadth challenge to a statute was permissible only where the overbreadth is "substantial . . . judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. Accordingly, if a statute would be overbroad only in a small number of its applications, such overbreadth might not be sufficiently substantial to justify a facial challenge.

By contrast, the present case involves a situation where, due to a significant defect in the very definition of the term "obscenity," the statute will necessarily be overbroad in every case which arises under it. In every such case, jurors will be instructed pursuant to a definition which goes beyond that which the states are constitutionally empowered to impose. Additionally, well before a determination must be made by triers of fact, distributors of sexually oriented material, police, prosecutors and judges will all be required to make decisions based on the overbroad definition. These circumstances surely support a facial overbreadth challenge. *See*, e.g. this Court's recent discussions of First Amendment—overbreadth standing in the cases of *Village of Hoffman Estates v. Flipside*, — U.S. —, 102 S.Ct. 1186, 1191 (1982) ["a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct," 102 S.Ct. at 1191; *see also* n. 6 *id.*]; *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*,

52 U.S.L.W. 4594, 4597, n. 19 (1984) ["where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack," *id.*]; and *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 52 U.S.L.W. 4875, 4878 (1984) ["use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted," *id.* at n. 7].

C. Pullman Abstention

The jurisdictional statements also fail to raise any significant claim that "*Pullman*"[11] abstention should have been invoked by the Ninth Circuit.

The procedural facts in this case are simple. The State of Washington previously had in effect a valid criminal obscenity statute which, by judicial construction, expressly adopted *Miller's* three-part test for obscenity. Under that test, the term "prurient interest" was undefined. In enacting the present legislation in 1982, the Legislature intentionally rejected the option of leaving the term "prurient interest" undefined as in the prior statute and also rejected adopting the Model Penal Code definition approved in both *Roth* and *Miller*. Instead, the Legislature, in R.C.W. § 7.48A.010(8), expressly and *exclusively* defined the word "prurient" as "that which incites lasciviousness *or lust*." (Emphasis added.) In so doing, the

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[11] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Legislature in unambiguous terms broadened its statutory net by insuring that the elements of "shamefulness" or "morbidity" or similar terms would play no part in the statutory definition.

In light of this clear legislative intent, the only way a state court could save the statute would be by finding the existing definitions unconstitutional and substituting, in their place, a definition consistent with the Constitution's requirements. These are precisely the types of circumstances where this Court very recently held (in a non-First Amendment context) that *Pullman* abstention should not be required. *Hawaii Housing Authority v. Midkiff*, 52 U.S.L.W. 4673, 4675 (1984). The First Amendment considerations herein make this case even *less* appropriate for *Pullman* abstention.

In *Hawaii Housing Authority, supra,* this Court rejected a *Pullman* abstention argument under circumstances where, as here, the legislative intent was clear and the statute was not otherwise complicated by ambiguous language. While acknowledging that the possibilities of a state court construction "*always* exist" (emphasis added), this Court pointed out that the relevant inquiry is whether "the statute is of an uncertain nature. . . ." *Id.* Under that test, *Pullman* abstention is clearly not required herein because the Washington statutory denition is simple, clear and precise.

In essence, what appellants seek is a ruling from this Court that pre-enforcement constitutional challenges to state statutes must initially be brought in the state courts to give them a "first look." However, this "first look" doc-

trine has consistently been rejected by this Court whenever it has been considered.[12] In *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981), a pre-enforcement challenge to a predecessor Washington obscenity-nuisance statute, a 6-3 majority of this Court rejected the dissent's suggestion that state courts be given the "initial opportunity to consider the scope and validity of state statutes." 454 U.S. at 1023. Similarly, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), in another pre-enforcement challenge, this Court struck down a Texas obscenity-nuisance abatement statute and rejected a dissenting opinion that the Texas courts be given "an opportunity to interpret

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[12] *See*, e.g., *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ["It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy. . . ."]; *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963) [holding that the purposes of the Civil Rights Act would be defeated "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"]; *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-416 (1964) ["the right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied. (Citation omitted.) Nor does anything in the abstention doctrine require or support such a result. * * * [The abstention doctrine's] recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *id.* at 415-416]; *Zwickler v. Koota*, 389 U.S. 241, 248-252 (1967) [holding that the above-described principles of *McNeese*, *supra*, and *England*, *supra*, have "particular significance when . . . the attack upon the statute on its face is for repugnancy to the First Amendment" *id.* at 251]; and *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 264, n. 8 (1977) [holding that "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court"].

Texas law" before such law is facially stricken by the federal courts. 455 U.S. at 319.[13]

Finally, the Attorney General argues that, by entertaining a pre-enforcement challenge to the statute, the federal courts deprive the State of Washington of any opportunity to obtain a narrowing construction of the statute. This is simply not so. A governmental defendant can always return to a federal court for modication of an injunction, whether interim or permanent, following a ruling by a state court which construes the enjoined statute in a manner so as to preserve its constitutionality.

In *Dombrowski v. Pfister,* 380 U.S. 479, 491 (1965), this Court, after recognizing the entitlement of the federal plaintiff to an injunction against enforcement of a state statute, held that the state, even after final injunctive relief, had the option of seeking a permissible narrowing construction of the statute in a non-criminal state court proceeding, after which it could return to the federal court for a modification of that court's injunctive order. *See,*

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[13] In addition to the reasons given by this Court in the cases cited at n. 12, *supra,* for rejection of the "first look" doctrine, perhaps the most compelling reason for rejection of the "first look" doctrine is this Court's recent rulings in *Allen v. McCurry,* 449 U.S. 90 (1980) and *Migra v. Warren City School District Bd. of Ed.,* — U.S. —, 104 S.Ct. 892 (1984) giving full collateral estoppel effect to state court determinations of federal constitutional issues, barring their relitigation in federal actions brought under the Federal Civil Rights Act. In light of these rulings, it is readily apparent that the "first look" doctrine has now become the "only look" doctrine except, of course, to the extent that appellate or certiorari review is always theoretically available in this Court. However, in *England, supra,* this Court specifically *rejected* the argument that the possibility of direct review in this Court is a sufficient safeguard of the policies which Congress was intending to further when it enacted the Federal Civil Rights Act. *See* discussion in *England, supra,* 375 U.S. at 416-417.

e.g., *Yuclan Enterprises, Inc. v. Nakagawa,* 583 F.Supp. 1574 (D.Hawaii 1984) [where, under the authority of F.R.Civ.P. 60(b), the federal court rescinded its prior final judgment which had enjoined enforcement of a Hawaii obscenity statute, following the subsequent ruling of the Hawaii Supreme Court rendering a saving construction of the statute].

Similarly, in *Sovereign News Co. v. Corrigan,* 610 F.2d 428 (6th Cir. 1979), *cert. den.* 447 U.S. 923 (1980), a District Court's order preliminarily enjoining enforcement of an Ohio anti-obscenity statute was remanded by the Sixth Circuit Court of Appeals for further consideration after a state court, in a ruling subsequent to the District Court's injunctive order, had rendered a potentially saving construction of the statute.

The State of Washington has not only had, at all times, the option of bringing a state court civil declaratory judgment action seeking a saving judicial construction of the statute, but has also had the option of simply amending the legislation here at issue so as to remove its constitutional difficulties.

That the State has exercised *neither* of the two available options simply underscores the hollowness of its claims that any such limiting construction could reasonably be expected. In brief, there are simply no special circumstances presented in the case at bar mandating the creation of a new "first look" doctrine or mandating a new circumstance where *Pullman* abstention should be required.

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SUMMARY

The near-unanimous adoption of the *Miller* test by courts and legislatures throughout the country has brought welcome stability to a previously unstable area of constitutional and statutory law.

The opinion of the Court of Appeals for the Ninth Circuit is consistent with the relevant decisions of this Court and federal courts throughout the country, as well as virtually all state courts and legislatures which have addressed the subject. Appellants have erroneously characterized the issues and their importance. Appellees respectfully submit that neither appellants' jurisdictional statements nor the opinion of the Court of Appeals for the Ninth Circuit raise substantial federal questions.

Affirmance of the opinion below will leave all state anti-obscenity legislation undisturbed except for Washington's and Mississippi's. (*See, Goldstein v. Allain, supra*).

CONCLUSION

For all the reasons above, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

August 7, 1984

Respectfully submitted,

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